

UNITED STATES DISTRICT COURT

DISTRICT OF NEW HAMPSHIRE

Vernon Gray,  
Petitioner

v.

Civil No. 07-cv-77-SM  
Opinion No. 2008 DNH 049

Bruce Cattell, Warden,  
New Hampshire State Prison,  
Respondent

**O R D E R**

In July of 2003, a state grand jury indicted Vernon Gray for attempted murder, first degree assault, and reckless conduct. Those charges arose out of an altercation during which Gray was accused of having shot Matthew Collier - a man with whom Gray believed his wife was having an affair. In May of 2005, a jury acquitted Gray of the more serious charges (i.e., attempted murder and assault), but convicted him of reckless conduct. Subsequently, Gray was sentenced to three and one-half to twenty years in the state prison.

Gray did not file a direct appeal of his conviction. He did, however, seek habeas corpus relief from the state trial court, asserting that: (1) his trial counsel provided constitutionally deficient representation; and (2) certain evidentiary rulings issued by the trial court operated to deprive

him of his constitutionally protected right to due process and a fair trial. When that collateral attack upon his conviction proved unsuccessful, Gray filed a petition seeking federal habeas corpus relief in this court. See 28 U.S.C. § 2254.

Pending before the court is the State's motion for summary judgment. For the reasons set forth below, that motion is granted.

#### **Standard of Review**

Since passage of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254(d), the power to grant federal habeas relief to a state prisoner with respect to claims adjudicated on the merits in state court has been substantially limited. A federal court may not disturb a state conviction unless the state court's adjudication "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). Alternatively, habeas relief may be granted if the state court's resolution of the issues before it "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United

States." 28 U.S.C. § 2254(d)(1). See also Williams v. Taylor, 529 U.S. 362, 399 (2000).

With respect to claims, like Gray's, which are brought pursuant to section 2254(d)(1), the United States Supreme Court has explained the distinction between decisions that are "contrary to" clearly established federal law, and those that involve an "unreasonable application" of that law.

Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

Williams, 529 U.S. at 412-13. The Court also noted that an "incorrect" application of federal law is not necessarily an "unreasonable" one.

The most important point is that an unreasonable application of federal law is different from an incorrect application of federal law . . . . Under § 2254(d)(1)'s 'unreasonable application' clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or

incorrectly. Rather, that application must also be unreasonable.

Id. at 410-11 (emphasis in original).

Finally, it probably bears noting that a state court need not rely upon, nor need it even cite, Supreme Court precedent in order to avoid resolving a petitioner's claims in a way that is "contrary to" or involves an "unreasonable application of" clearly established federal law. See Early v. Packer, 537 U.S. 3, 8 (2002) ("Avoiding these pitfalls does not require citation of our cases - indeed, it does not even require awareness of our cases, so long as neither the reasoning nor the result of the state-court decision contradicts them.") (emphasis in original).

With those principles in mind, the court turns to Gray's petition and the State's motion for summary judgment.

#### **Discussion**

In support of his petition seeking habeas relief, Gray asserts that his trial counsel provided him with constitutionally deficient representation, in violation of his Sixth Amendment rights. He also says that the trial court made several erroneous evidentiary rulings, thereby depriving him of his

constitutionally protected rights to due process and a fair trial. The state habeas court addressed those claims on the merits and resolved them against Gray. Gray v. Cattell, No. 06-E-80 (Merrimack Superior Court Nov. 13, 2006) (Exhibit AE-17 to defendant's answer) (document no. 6-28). Gray appealed that decision to the New Hampshire Supreme Court, which declined to accept the appeal.

I. Gray Exhausted his Claims in State Court.

As a preliminary matter, the State asserts that Gray did not exhaust his claims by properly appealing the habeas court's decision to the state supreme court. Accordingly, says the State, those claims are unexhausted and Gray is procedurally barred from returning to state court and exhausting them. The court disagrees.

After the superior court denied his habeas corpus petition, Gray filed an ambiguous pleading with the state supreme court, which he apparently captioned "Petition for Habeas Corpus." Subsequently, however, Gray made clear to the court that, rather than filing a new petition for habeas corpus relief he was, instead, appealing the adverse decision issued by the state habeas court in Gray v. Cattell. He did so by filing a "Rule 7

Notice of Discretionary Appeal," a form which expressly provides that it is to be used to "appeal from a final decision on the merits issued by a superior court . . . [in] a proceeding involving the collateral challenge to a conviction or sentence." See Exhibit AE-15 to defendant's answer (document no. 6-26). The state supreme court plainly understood Gray's actual intent, and, after considering the merits of his appeal, declined to accept it. See Exhibit AE-18 to defendant's answer (document no. 6-29).

Importantly, the state supreme court did not reject Gray's appeal on grounds that he had waived any rights or that he had failed to properly present any issues on appeal. See id. ("The matter was considered by each justice whose name appears below. If any justice who considered this matter believed the appeal should have been accepted, this case would have been accepted and scheduled for briefing."). Accordingly, this court must presume that the state supreme court denied Gray's federal constitutional claims on the same grounds articulated by the state habeas court in Gray v. Cattell. See Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991) ("Where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same

ground. If an earlier opinion fairly appears to rest primarily upon federal law, we will presume that no procedural default has been invoked by a subsequent unexplained order that leaves the judgment or its consequences in place.") (citation and internal punctuation omitted).

This record suggests that the state supreme court fully (and correctly) understood that the issues Gray sought to raise on appeal were those issues identified in his earlier filing, as supplemented by the Rule 7 Form. So, although the state supreme court declined to accept his appeal, Gray nevertheless fairly presented his constitutional claims to the State's highest court. Those claims are, then, fully exhausted. See, e.g., Clements v. Maloney, 485 F.3d 158, 162 (1st Cir. 2007) ("In order to exhaust a claim, the petitioner must present the federal claim fairly and recognizably to the state courts, meaning that he must show that he tendered his federal claim in such a way as to make it probable that a reasonable jurist would have been alerted to the existence of the federal question.") (citation and internal punctuation omitted).<sup>1</sup>

---

<sup>1</sup> The State also asserts that Gray's claims are procedurally defaulted. But, the basis for that argument is unclear. Nevertheless, it is sufficient to note that the only claims that are procedurally defaulted (i.e., those Gray failed to raise in a timely direct appeal of his conviction) are those

## II. Gray's Claims Fail on the Merits.

Having determined that Gray's claims are fully exhausted, the court turns to a consideration of those issues on the merits. Parenthetically, the court notes that even if Gray had not fully exhausted the issues he presses in his federal habeas corpus petition, the court is still authorized to deny them on the merits. See 28 U.S.C. § 2254(b) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.").

### A. Ineffective Assistance of Counsel.

In resolving Gray's claim that he was denied effective assistance of counsel, the state habeas court properly observed that Gray bore the burden of establishing that counsel's conduct fell below the standard of reasonably effective assistance and

---

relating to his assertion that the trial court made several erroneous evidentiary rulings. See Gray v. Cattell, slip op. at 10 ("Rather than appeal his conviction, however, the petitioner determined, after discussion with his counsel, not to seek an appeal. The Court concludes that the petitioner has thereby waived collateral review of the trial judge's evidentiary rulings."). But, Gray does not press those arguments in his federal habeas petition, so the issue is of no moment. Among other issues advanced in this case is Gray's claim that various rulings by the trial court served to deprive him of his constitutionally protected rights - claims that the state habeas court concluded were not procedurally defaulted and, therefore, addressed on the merits. See id. at 12.



that counsel's errors prejudiced his defense. Gray v. Cattell, slip op. at 4-5. See generally Strickland v. Washington, 466 U.S. 668, 687 (1984). The court then thoroughly discussed the basis for its conclusion that Gray's trial counsel did not provide constitutionally deficient representation. Id. at 7-9 (noting, among other things, that many of the decisions Gray challenges were reasonable strategic decisions by trial counsel, which are entitled to substantial deference). Next, the court concluded that, even if Gray had proved that trial counsel's representation was deficient, Gray failed to demonstrate that he had been prejudiced by counsel's alleged errors. Id. at 9.

Nothing in either Gray's habeas petition or his memorandum plausibly suggests that the state habeas court's resolution of his ineffective assistance claim was either contrary to, or involved an unreasonable application of, clearly established federal law. See 28 U.S.C. § 2254(d)(1). In fact, just the opposite is true. The record reveals that the state habeas court properly identified the controlling federal legal principles, as articulated by the United States Supreme Court, and reasonably applied those principles in resolving Gray's petition. Consequently, Gray is not entitled to federal habeas corpus relief as to his ineffective assistance of counsel claims.

B. Due Process Violations.

As construed by the Magistrate Judge, Gray's federal habeas petition raises two claims relating to the admissibility of evidence at his criminal trial.

Gray alleges that the trial judge in the case erred in ruling that the key State's witness did not have potential criminal liability that would require his testimony to be excluded under the Fifth Amendment, and that therefore the testimony of the witness was admissible at trial, as it would not cause the witness to incriminate himself. Further, the trial court abused its discretion in not allowing the defense to introduce certain impeachment evidence that, Gray alleges, was admissible, relevant, and material to the success of his case. Accordingly, Gray alleges that the trial court violated his Fifth, Sixth, and Fourteenth Amendment rights to due process and a fair trial.

Magistrate Judge's Preliminary Review of Gray's Petition  
(document no. 4) at 5-6.

Prior to Gray's criminal trial, the court conducted what is known as a Richards hearing, to determine whether Mr. Collier's right against self-incrimination would be implicated by his proposed trial testimony. See generally State v. Richards, 129 N.H. 669 (1987) (vacating a defendant's conviction because the trial court failed to properly investigate the validity of the Fifth Amendment privilege asserted by the defendant's sole witness). See also State v. Caplin, 134 N.H. 302, 308 (1991)

(noting that the purpose of a Richards hearing is to allow the trial court to determine "whether to compel a witness to testify, after balancing the witness's right to be free from self-incrimination with the right of the accused to produce exculpatory evidence"). Following that hearing, the court concluded that Mr. Collier's constitutional rights would not be implicated and, therefore, allowed the State to call him as a witness. Mr. Collier then testified at trial and did not seek to invoke his Fifth Amendments rights.

Gray's assertion that the trial court improperly allowed Mr. Collier to testify lacks legal merit. The purpose of a Richards hearing is to determine whether a criminal defendant can compel a witness to testify at trial, notwithstanding the witness's intention to invoke the Fifth Amendment's privilege against self-incrimination. It is not, as Gray seems to believe, a process by which a defendant may preclude a witness from testifying against him. Gray was not entitled to assert the Fifth Amendment privilege of a potential witness as a bar to his testifying. That right is personal to the witness and only the witness can invoke it. See, e.g., Couch v. United States, 409 U.S. 322, 328 (1973). Plainly, then, the trial court did not err by allowing Mr. Collier to testify against Gray.

Moreover, even if he could demonstrate that the trial court erred by allowing Mr. Collier to testify, Gray has not demonstrated that he was deprived of any constitutionally protected rights as a consequence. It goes without saying that Gray's Fifth Amendment rights were not violated when Mr. Collier testified against him. Nor has Gray shown how the admission of that testimony violated his constitutionally protected right to due process and/or a fair trial. It necessarily follows that Gray has failed to establish that the state habeas court's disposition of that claim was contrary to, or involved an unreasonable application of, clearly established federal law.

Finally, Gray asserts that he was denied due process when the trial court refused to allow him to introduce evidence he says would have impeached the credibility of Mr. Collier, the State's primary witness against him. The state habeas court properly noted that because Gray failed to raise that issue on direct appeal (i.e., it was procedurally barred), Gray was entitled to habeas relief only if he could demonstrate that: (1) the (allegedly) improperly excluded evidence was material; and (2) its exclusion rendered his trial fundamentally unfair. Gray v. Cattell, slip op. at 10-11. See generally Wilkerson v. Cain, 233 F.3d 886, 890 (5th Cir. 2000) ("Habeas relief may be granted

based on the state court's erroneous evidentiary ruling only if that ruling violated [the petitioner's] constitutional rights or rendered his trial fundamentally unfair."). In other words, Gray was obligated to make a plausible showing that the excluded evidence "would have been both material and favorable to his defense." United States v. Valenzuela-Bernal, 458 U.S. 858, 867 (1982).

After reviewing Gray's claims and the evidence introduced at his trial (as well as the impeachment evidence Gray says was improperly excluded), the state habeas court sustainably concluded that because Gray's trial counsel had so effectively impeached the credibility of the State's witness, even if such evidence was improperly excluded from Gray's trial, it was, at best, cumulative and, therefore, not material. Although Gray plainly disagrees with that decision, more is necessary to demonstrate that he is entitled to federal habeas corpus relief.

### **Conclusion**

The arguments Gray advances in his petition for federal habeas corpus relief were not procedurally defaulted in the state courts. And, Gray properly exhausted those claims by raising them before the habeas court and then appealing that court's

adverse decision to the New Hampshire Supreme Court. It is, then, appropriate to address those federal constitutional claims on the merits. But, having done so, the court concludes that Gray has failed to carry his substantial burden of proving that the state habeas court's resolution of those claims was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Nor has he shown that the habeas court's decision was based on "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2).

For the foregoing reasons, as well as those set forth in the State's memorandum (document no. 15-2) at 17-25, Gray is not entitled to federal habeas corpus relief. The State's motion for summary judgment (document no. 15-1) is, therefore, granted. The Clerk of Court shall enter judgment in accordance with this order and close the case.

**SO ORDERED.**

  
Steven J. McAuliffe  
Chief Judge

March 4, 2008

cc: Vernon Gray, pro se  
Susan P. McGinnis, Esq.  
Stephen Fuller, Office of NHAG  
John Vinson, NHDOC